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In the Supreme Court of the United States

MIPRO HOMES, L.L.C., AND BUILDERS LEAGUE OF SOUTH JERSEY, INC.,

Petitioners,

v.

MOUNT LAUREL TOWNSHIP,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Takings Clause of the Fifth Amendment to the Constitution prohibits a municipality from taking private property for "public use" when the municipality's public use determination is ad hoc, pretextual, and not part of a comprehensive planning process.

RULES 14.1 AND 29.6 STATEMENT

Petitioners (defendants-appellants below) are MiPro Homes, L.L.C., and the Builders League of South Jersey, Inc. Additional defendants in the Superior Court, Law Division, who are not petitioners here, were Lorraine C. Elbon and 190 Elbo, L.L.C.

Respondent (plaintiff-appellee below) is Mount Laurel Township, New Jersey.

Petitioner Builders League of South Jersey, Inc., is a New Jersey non-profit corporation. It has no publicly traded stock and no publicly held corporation owns 10% or more of its stock.

Petitioner MiPro Homes, L.L.C. is a New Jersey limited liability company. It has no publicly traded stock and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

MiPro Homes, L.L.C., and the Builders League of South Jersey, Inc., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (App., *infra*, 1a-7a) is reported at 188 N.J. 531, 910 A.2d 617. The opinion of the Superior Court of New Jersey, Appellate Division (App., *infra*, 8a-26a), is reported at 379 N.J. Super. 358, 878 A.2d 38. The opinion of the Superior Court of New Jersey, Law Division (App., *infra*, 27a-46a), is unreported.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on December 7, 2006. On February 15, 2007, Justice Souter extended the time for filing this petition for certiorari to April 6, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part: "nor shall private property be taken for public use, without just compensation."

STATEMENT

This Court recently held that government has broad powers to take private property for "public use" under the Fifth Amendment. *Kelo* v. *City of New London*, 545 U.S. 469 (2005); see also *Berman* v. *Parker*, 348 U.S. 26 (1954); *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229 (1984). But although the Court "afford[s] legislatures broad latitude in determining what public needs justify the use of the takings power," and will not second-guess whether "the expected public benefits will actually accrue" from a taking, it also has recognized that not every exercise of eminent domain passes judicial muster under the Takings Clause. *Kelo*, 545 U.S. at

483, 487. Rather, the Constitution mandates minimum procedural requirements to ensure that a taking is in fact for the purported public use. Two safeguards emphasized by this Court but ignored by the Supreme Court of New Jersey are particularly relevant in this case: a municipality's public use determination must not be ad hoc but must be made as part of a comprehensive planning process, and it must not be pretextual. *Id.* at 483-484; see also *id.* at 492-493 (Kennedy, J., concurring); *id.* at 504 (O'Connor, J., dissenting). These limitations—which the supreme courts of other States also have recognized as necessary for the protection of private property—are essential if the public use requirement of the Takings Clause is to amount to anything more than "hortatory fluff." *Id.* at 497 (O'Connor, J., dissenting).

This "egregious" case, as Justice Rivera-Soto explained in his dissent from the Supreme Court of New Jersey's decision upholding the condemnation at issue, presents "'a random taking'" and hence "an improper exercise of the power of eminent domain." App., *infra*, 2a-3a. Mount Laurel Township took 16 acres of private land—on which petitioner Mi-Pro Homes had already started to construct a fully permitted and zoning-compliant 23-home residential development—following an ad hoc determination that the property should instead be used for "open space." That determination took place outside the scope of the Township's comprehensive planning process and was found by the trial court to be a pretext for the distinct goal of stopping residential development. No similar determination had been prompted by the prior owner's proposed use of the property for an assisted living facility, which would have put less demand on public services (schools in particular).

This case therefore implicates both of the specific limitations on public use decisions identified in *Kelo*. It perfectly illustrates the importance of such limitations to the protection of private property, which for the Framers of the Bill of Rights supplied "the clear, compelling, even defining, in-

stance of the limits that private rights place on legitimate government." JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). The Court should take this opportunity to elaborate upon the standards articulated in *Kelo*, with which the Supreme Court of New Jersey's ruling conflicts and as to which state courts and lower federal courts are in considerable disarray, and it should reverse an erroneous decision that threatens the most basic underpinnings of our Constitution. See THE FEDERALIST NO. 54 (James Madison), at 339 (C. Rossiter ed., 1961) ("Government is instituted no less for protection of the property than of the persons of individuals").

A. Mount Laurel's Condemnation Of MiPro's Property Was Ad Hoc, Pretextual, And Not Pursuant To A Comprehensive Plan For The Preservation Of Open Space.

MiPro Homes contracted in 2001 for the purchase of 16 acres of land in Mount Laurel Township from 190 Elbo, L.L.C., intending to subdivide the parcel and to build 23 single family homes. App., *infra*, 28a. The parcel was already zoned for residential use and MiPro's planned development required no variances. In 1997 Mount Laurel had considered the possibility of "slow[ing] down the rate of the municipality's growth" by "rezoning substantial areas for less intensive uses," but had decided against that approach. *Id.* at 9a.

Before execution of final sale, MiPro applied for Preliminary Major Subdivision Approval, which Mount Laurel's Planning Board approved. The sale was finalized on August 30, 2001. MiPro then applied for Final Major Subdivision Approval, which the Planning Board granted on May 9, 2002. With final municipal approval for the project in hand, MiPro conducted "a significant amount of site preparation work," such as clearing, grading, and excavation for roads,

utility lines, and stormwater detention, and stockpiling dirt. App., *infra*, 14a, 28a; PA365-371, PA415-419.[1]

During this same period of time, without notice to MiPro, several Mount Laurel officials began to investigate acquiring MiPro's property as "open space." In October 2001, five months after its Planning Board had approved MiPro's development proposal, Mount Laurel added the MiPro site to the list of prospective open space acquisitions in its Open Space Recreation Plan. App., *infra*, 13a. In April 2002, a year after preliminary subdivision approval was granted, Mount Laurel adopted Ordinance 2002-4, which characterized MiPro's property as being "under severe development pressure" and authorized its acquisition "by agreement or through the exercise * * * of the power of eminent domain." PA453-454. After MiPro was granted final subdivision approval by the Planning Board, and after Mount Laurel's attempts at voluntary acquisition failed, the Township filed suit seeking to condemn MiPro's property. PA1-5.

"The evidence * * * is undisputed" that Mount Laurel's goal in acquiring MiPro's property for "open space" was to "[s]ave" the land "[f]rom [d]evelopment" and "reduc[e] the number of residential units in the Township." App., *infra*, 31a-32a. Mount Laurel's conceded purpose was to prevent the "significant cost[s]" that it believed would flow from MiPro's planned development of single family homes in the form of demand for "education and other municipal services," which the Township believed would be offset by "little by way of tax ratables." App., *infra*, 14a, 32a-33a; see also PA491-492.

Mount Laurel did not act pursuant to articulated standards or its established land use plan in pursuing this goal. In deciding to acquire MiPro's property, Mount Laurel officials

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[1] "PA" refers to the Plaintiff's Appendix filed by Mount Laurel in the Superior Court of New Jersey, Appellate Division.

did not consult with the Planning Board, either prior to passing Ordinance 2002-4 or before filing the present condemnation action, to determine whether acquisition of the MiPro property would be consistent with the Township's open space goals and policies. App., *infra*, 43a-44a; PA478-479. Mount Laurel's 2000 Master Plan does not indicate a need for open space at the MiPro site and does not recommend a change in the zoning category for MiPro's property. PA129-131. Furthermore, prior to Mount Laurel's approval of MiPro's development plans, MiPro's property was not listed as a potential acquisition in capital improvement program documents, on the official township map, or on the open space suitability map. PA1915; PA868; PA871.

In fact, only in January 2003, seven months after this litigation was commenced, did Mount Laurel amend its 2000 Master Plan to provide that the Township's policy is to acquire "the maximum amount of open space remaining in the township that can be achieved with sound use of financial resources." And that belated revision, far from reflecting careful planning, simply lumped together "*all* potential parcels" in the Township that had not yet been developed as "locationally suitable for permanent open space." App., *infra*, 14a (emphasis added); PA798-799.

Mount Laurel officials, in the course of attempting to acquire MiPro's property, never detailed the Township's need for more open space. In fact, Louis Glass, Township Planner for 27 years, admitted that Mount Laurel's open space was already "well in excess" of that needed according to existing standards: it had "seven hundred and twenty-one acres [of open space] available," which amounted to "a two hundred and ninety-six acre surplus using [the] methodology" set forth in the 2000 Master Plan. PA729, 737; see App., *infra*, 33a-34a. By contrast, George Morris, the Mount Laurel Township Deputy Manager, explained in his deposition that the Township had not set a maximum goal, or a minimum goal, for the acquisition of open space and had

conducted "no study * * * to determine how much passive open space was needed in Mount Laurel or what the active open space needs were." App., *infra*, 32a. Instead, Morris expected that "the voters" would "tell [the Township when] enough is enough." *Ibid.*; PA542. Confirming Mount Laurel's utter lack of methodological consistency in its approach to taking private property for open space, John Maczuga, public planning manager of the firm employed by the Township to assist in open space acquisition, testified that Mount Laurel prepared no prioritization or ranking of properties suitable for acquisition. App., *infra*, 33a; PA628-629; see also PA776-783, 795-796 (Harry McVey, a professional planner for the Planning Board, testified that Mount Laurel did not systematically analyze the need for or suitability of parcels for passive open space, MiPro's property being no exception).

In short, as the trial court concluded with regard to the official principally responsible for Mount Laurel's "open space issues," George Morris, "[t]here was no open space plan from which he worked, no coordination with the planning board or consultation of the Master Plan, * * * no prioritization or ranking of properties desirable for and needed for recreation and open space," and "no study or report from which he sought or could receive guidance as to the amount of active and passive open space needed." App., *infra*, 32a, 43a; see also PA546-547.

B. The Trial Court Dismissed The Complaint In Condemnation Because It Was Inadequately Planned And Pretextual.

On the basis of these undisputed facts, the Superior Court, Law Division, granted MiPro's and the intervenor Builders League of South Jersey's motions for summary judgment. The trial court recognized that municipalities have "broad discretion" to determine whether the acquisition of private property is in the public interest and that courts gen-

erally will not probe a municipality's "motive or the necessity for the taking." App., *infra*, 35a. Nevertheless, citing the Township's utter lack of planning and numerous admissions of pretext, the court held that "overwhelming evidence" established that Mount Laurel's condemnation of MiPro's property was improperly "motivated by an ulterior, disguised purpose." *Id.* at 35a-36a, 46a. The Township's "real purpose" was to prevent "yet another" politically unpopular "residential development" that would contribute to the "rising cost of education and other municipal services." *Id.* at 42a, 44a. According to the court, the preservation of open space was merely "a collateral consequence"—"not even a secondary goal"—of the condemnation, a fact confirmed by public comments and signs posted throughout the Township declaring that, as requested by the voters, "more land ha[d] been spared from development." *Id.* at 31a, 44a. The Township's lack of "planning and zoning" and the pretextual reason it gave for the condemnation of MiPro's land amounted, the court concluded, to an "abus[e of] the awesome power of eminent domain." *Id.* at 45a.

C. The Appellate Division Reversed.

The Appellate Division did not disturb any of the trial court's factual findings, and conceded that Mount Laurel's "master plan did not [at the relevant time] identify open space as a planned use in the area where [MiPro's land] is located." App., *infra*, 18a. It ruled, however, that the Township had statutory authority to condemn private land for open space and did not have to "have a plan" in order to exercise that authority or act in accordance with "open space [designations] in Mount Laurel's master plan." *Id.* at 16a.

Furthermore, it did not matter that the Township's stated "open space" motive for the condemnation was a pretext for stopping residential development. App., *infra*, 23a-24a. "Commercial property owners send no children to [the Township's] schools and set out no trash for municipal col-

lection"; by contrast, residential development creates a "significant cost to all taxpayers for many years, perhaps indefinitely." *Id.* at 12a-13a. Mount Laurel's "concern that additional residential development would * * * impose added stress on its school system and other municipal services" was therefore "reasonable." *Id.* at 24a. Mount Laurel's actions were particularly justified, the court concluded, because MiPro's planned use for the land was not for assisted living or affordable housing, but for single-family homes priced between $400,000 and $450,000 that the court asserted "would not serve a comparable public interest." *Id.* at 13a, 25a.

D. The Divided Supreme Court Of New Jersey Affirmed, Holding That The Public Interest In Condemning Private Property For Open Space Overcomes The Need For Comprehensive Planning.

The Supreme Court of New Jersey affirmed the judgment of the Appellate Division.[2] The majority held that Mount Laurel has a "strong and sustained public interest in the acquisition and preservation of open space," demonstrated by statutes authorizing expenditures for this purpose, as well as Mount Laurel residents' support "for the issuance of state and county bonds to provide funding for open space acquisition." App., *infra*, 1a. The acquisition of MiPro's property was consistent with this objective, the state supreme court reasoned, because it was directed at "limit[ing] the overcrowded schools, traffic congestion and pollution that accompanies development." *Id.* at 1a-2a.

Justice Rivera-Soto dissented, agreeing with the trial court that "this case presents an improper exercise of the

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[2] Underlining the importance of the issues presented, separate amicus briefs were filed in the Supreme Court of New Jersey by the National Association of Home Builders, New Jersey Builders Association, State of New Jersey, New Jersey State League of Municipalities and New Jersey Institute of Local Government Attorneys, and Chosen Freeholders of the County of Burlington.

power of eminent domain." App., *infra*, 2a. Justice Rivera-Soto would have held that the Township's asserted open space "public policy basis for the condemnation of MiPro's property" was merely an "after-the-fact" justification for a "'random taking,'" which in truth was carried out "'to stop residential development.'" *Id.* at 3a-4a.

Justice Rivera-Soto also "reject[ed] the Appellate Division's value judgment in respect of the social worth of MiPro's development plans" as compared to assisted living or affordable housing, concluding that a judge's view "of what is or is not socially redeeming" has no place in the analysis of the propriety of eminent domain. App., *infra*, at 4a-5a. Because Mount Laurel acted unreasonably, arbitrarily, capriciously, and in bad faith in condemning MiPro's land, Justice Rivera-Soto would have reinstated summary judgment for petitioners. *Id.* at 5a.

REASONS FOR GRANTING THE PETITION

"Eminent domain condemnation represents one of the legal system's most drastic non-penal incursions into the rights of individuals." Zygmunt J.B. Plater & William L. Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 663-664 (1989). In this case, Mount Laurel took MiPro's 16-acre parcel—which MiPro already had begun to develop for a fully permitted, zoning-compliant subdivision of single family homes—for use as "open space" that fit nowhere within the Township's comprehensive plan. Mount Laurel did so, moreover, through an open space determination that concededly was a pretext for stopping residential development because it would impose more demands on schools and other government services. The Supreme Court of New Jersey was able to uphold this ad hoc and pretextual taking only because it assumed that the

"public use" condition does not operate as a meaningful limit on the takings power.

The Supreme Court of New Jersey's ruling is flatly inconsistent with this Court's precedents and at odds with the recognition by other federal courts and state supreme courts that the public use requirement imposes constraints upon a municipality's power of eminent domain. This Court should grant certiorari to clarify that its decision in *Kelo* v. *City of New London*, 545 U.S. 469 (2005), did not strip the public use requirement of all content but left intact—at the least—procedural limitations on eminent domain that require reversal in this case. The practical importance of this issue is undeniably immense. See, *e.g.*, DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-*KELO* WORLD (June 2006), available at http://www.castlecoalition.org/publications/floodgates/index.html (describing the substantially increased use of condemnation after *Kelo*); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 207 (2002) ("eminent domain is being pressed into service in increasingly questionable ways").

I. THE SUPREME COURT OF NEW JERSEY'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The "lingering suspicion" left by the Supreme Court of New Jersey's decision "is that condemnees would have been better off in mc lern courts if the Framers had failed totally to mention their situation" in the Bill of Rights, "as with 'privacy' rights." Plater & Norine, *supra*, 16 B.C. ENVTL. AFF. L. REV. at 679. This Court's ruling in *Kelo*, limiting substantive review of eminent domain decisions, engendered nationwide debate and extensive criticism. See, *e.g.*, H.R. Res. 340, 109th Cong. (2005). The New Jersey court's decision, by stripping away procedural protections as well, threatens the severe "demoralization" that a leading commentator has predicted must result from arbitrary obliteration of landown-

ers' expectations of security in their private property. Frank I. Michelman, *Property, Utility, & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

Petitioners believe, however, that a careful reading of the opinions in *Kelo* and of the earlier decisions upon which this Court in *Kelo* relied confirms that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994). Properly understood, the line of cases culminating in *Kelo* recognize procedural limitations, of constitutional dimension, on government's power to declare that a condemnation is for "public use." This Court has never deviated from its holding in *Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930), that despite the Court's "great respect [for] legislative declarations" a condemnation cannot stand if it is supported only by "a bare recital," rather than appropriate analysis, or if the stated goal is "foreign to the actual purpose of the appropriation as ultimately disclosed." See *Kelo*, 545 U.S. at 487 n.17 (citing *Vester* with approval); see also *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 676 (1923) (municipality's determination that land was "required for public use" may not be "palpably arbitrary"). Any more hands-off approach to a municipality's public use decision would "treat the constitutional provision as giving such a sweeping authority to municipalities as to make nugatory the express condition upon which the authority is granted." *Vester*, 281 U.S. at 447. The Supreme Court of New Jersey's decision runs directly counter to these principles.

1. Though this Court affords state and local governments "broad latitude in determining what public needs justify the use of the takings power," deference to government's "public use" determinations is not absolute. *Kelo*, 545 U.S. at 483. In upholding New London's exercise of eminent domain

in *Kelo*, this Court stressed the importance to its analysis of the fact that the taking occurred as part of a "carefully formulated" "integrated development plan," which had resulted from a process of extensive planning activities, neighborhood meetings, and studies by state agencies of "the project's economic, environmental, and social ramifications," including evaluation of "six alternative development proposals." *Id.* at 473-474 & n.2, 483; see also *id.* at 483-484 (emphasizing "the comprehensive character" of New London's "carefully formulated * * * economic development plan" and "the thorough deliberation that preceded its adoption"). This Court recognized that a different result may obtain when eminent domain is exercised "outside the confines of an integrated development plan." *Id.* at 487.

By contrast to the "heightened form of review" of eminent domain that this Court rejected in *Kelo*—judicial inquiry into whether "the expected public benefits will actually accrue"—a court's insistence on procedural safeguards for the "public use" determination does not involve it in "'empirical debates over the wisdom'" of a municipality's goals in exercising the takings power. *Kelo*, 545 U.S. at 488. Requiring that a municipality's public use decision result from planning and not be pretextual does not entail "second-guess[ing of] the City's *considered* judgments about *the efficacy of its development plan.*" *Ibid.* (emphasis added). To the contrary, these safeguards serve to ensure that public use decisions that lead to the taking of private property are indeed "considered" and the result of planning, rather than merely ad hoc reactions to not-in-my-back-yard political pressures.

Justice Kennedy's separate opinion in *Kelo* confirms that it is an "incorrect assumption" that the Takings Clause "imposes no meaningful judicial limits on the government's power to condemn any property it likes." *Kelo*, 545 U.S. at 492 (Kennedy, J., concurring). While Justice Kennedy had no occasion in *Kelo* for "conjecture as to what sort of cases might justify a more demanding standard," he assumed as a

bedrock principle that the Fifth Amendment prohibits takings, whatever their "'stated public purpose,'" that have only "incidental or pretextual public justifications." *Id.* at 491, 493; see Gideon Kanner, *What Does It Take to Recognize Bad Faith?*, JUST COMPENSATION, Dec. 2006, at 11 ("the bottom line" of the Supreme Court of New Jersey's decision in this case "is that as long as the use for which the property is taken is deemed public, it does not matter whether the city's stated intentions in taking it are truthful or pretextual. So much for Justice Kennedy's concurring opinion in *Kelo*"). Justice Kennedy emphasized in *Kelo* that New London's proposed taking suffered from no such defect because it "occurred in the context of a comprehensive development plan," the City "complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes," and "the procedures employed" were not "prone to abuse." *Kelo*, 545 U.S. at 493.

The dissenters in *Kelo* acknowledged Justice Kennedy's view that a municipality may fail the public use test as a result of "the process by which [it] arrived at the decision to take" and that, accordingly, the Clause "prohibit[s takings] generated with less care" through a "less elaborate process." 545 U.S. at 502, 504 (O'Connor J., dissenting). Justice O'Connor was also careful to note the *Kelo* majority's emphasis on the fact that New London's "plan is the product of a relatively *careful deliberative process*" and that the City "proposes to use eminent domain for a multipart, *integrated plan* rather than for *isolated property transfer*." *Id.* at 503-504 (emphasis added).

In short, the members of the majority and dissent alike in *Kelo* recognized that some "external, judicial check" on public use determinations, "however limited, is necessary if this constraint on government power is to retain any meaning." *Id.* at 497 (O'Connor, J., dissenting). The majority opinion, the principal dissent, and Justice Kennedy in his separate opinion all found that check in procedural safe-

guards surrounding New London's public use determination. Absent these safeguards, municipalities could substantially eliminate the public use limitation on their eminent domain power, evading effective judicial review of their public use determinations by proceeding in an ad hoc manner and for pretextual reasons.

2. This Court's decisions in *Berman* and *Midkiff*, upon which *Kelo* heavily rests, likewise acknowledged the importance under the Fifth Amendment of a procedurally sound public use determination. In *Berman*, Justice Douglas's opinion for a unanimous Court emphasized that the challenged condemnation of a non-blighted department store occurred pursuant to "a comprehensive or general plan," under which a redevelopment agency planned "the area [at issue] as a whole" rather than approaching condemnation on a "piecemeal," "structure-by-structure basis." 348 U.S. at 29, 34. That the district proceeded under a "balanced, integrated plan" was central to the Court's decision that "owner after owner [should not be] permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest." *Id.* at 34-35. See Carol J. Miller & Stanley A. Leasure, *Post-Kelo Determination of Public Use and Eminent Domain in Economic Development Under Arkansas Law*, 59 ARK. L. REV. 43, 67 (2006) ("In both *Kelo* and *Berman*, the Court rejected the piecemeal approach"; "to be successful," land use plans must be "comprehensive [and] coordinated").

Likewise, Justice O'Connor's opinion for the Court in *Midkiff* emphasized the care with which the Hawaii legislature had considered and developed its scheme to compel the sale of fee simple estates to lessees, including the elaborate process, with formal findings, provided by the Hawaii Housing Authority in connection with each taking. *Midkiff*, 467 U.S. at 232-234. That scheme was a "comprehensive and rational approach to identifying and correcting market failure." *Id.* at 242.

3. The existence of procedural limitations on a municipality's public use determination is congruent with this Court's oft-repeated admonition that the "concepts of 'fairness and justice' * * * underlie the Takings Clause." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002); see also, *e.g.*, *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (the Takings Clause subjects governmental regulation "to the dictates of 'justice and fairness'"); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). And they are the minimum protections required to ensure that the Takings Clause stands, as the Framers intended, "as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharm.* v. *Beckwith*, 449 U.S. 155, 164 (1980). That the Takings Clause applies to the States and their subdivisions through the Due Process Clause of the Fourteenth Amendment, see *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 238-239 (1897), only serves to underline that the eminent domain power is subject to core procedural limitations.

As one commentator recently recognized, consistent with *Kelo*, "[a]n alternative test" for public use "would demand 'reasonable process,'" including evidence "of adequate planning procedures." Eric Rutkow, *Kelo v. City of New London*, 30 HARV. ENVTL. L. REV. 261, 275 (2006). That inquiry would "plac[e] a procedural check on governments in order to protect property owners," thereby "ensuring heightened procedural review when inoffensive property is being condemned"—a goal "promoted by the Fourteenth Amendment's Due Process Clause and Lockean principles concerning liberty of property." *Id.* at 276. The commentator concluded that such a procedural inquiry is important in order to determine "whether A's property is being taken for any coherent reason. When the condemned property presents no social harm by itself"—like MiPro's condemned parcel—"at the very least the state should have to show it has given thought to the use of property that goes beyond indefinite or

contradictory labels such as 'park support'" (or "open space"). *Ibid.* See also Clayton Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13, 20 (2005) (endorsing "procedural requirements" that "reduce the probability of abuse").

Leading scholars agree that, absent substantive limits on what qualifies as a "public use," giving meaning to the Takings Clause requires "that courts strictly enforce procedural limitations on the exercise of eminent domain" in order to "filter out * * * some of the questionable uses" of that power. DANA & MERRILL, PROPERTY: TAKINGS, *supra*, at 205-206; see also *id.* at 208 (recent abuses "suggest the need for increased judicial vigilance in enforcing procedural rules associated with eminent domain"). Insisting on these procedural requirements, which derive from "the Due Process Clauses, as well as the Takings Clause," "has the virtue of" protecting private property rights by "enlisting the courts in the performance of a traditional judicial function for which they are well qualified." *Id.* at 205, 207. Accord Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77-81 (1986).

II. THE SUPREME COURT OF NEW JERSEY'S DECISION CONFLICTS WITH RULINGS OF OTHER STATE AND FEDERAL COURTS.

The "public use" limitations on eminent domain set forth in this Court's decisions and recognized by academic commentators are also reflected in numerous state and federal decisions with which the Supreme Court of New Jersey's ruling conflicts.

In the Ninth Circuit, for example, courts reject the use of eminent domain when its exercise is not the result of planning or is pretextual. Thus, in *Armendariz* v. *Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996), the en banc court refused to defer to a city's ostensible public use determination made "behind closed doors" and with a view to justifying its ac-

tions in litigation. And in *99 Cents Only Stores* v. *Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), appeal dismissed as moot, 2003 WL 932421 (9th Cir. Mar. 7, 2003), the court explained that "[n]o judicial deference is required * * * where the ostensible public use is demonstrably pretextual" (citing *Armendariz*).

In *Cottonwood Christian Center* v. *Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229-1230 (C.D. Cal. 2002), the court held that a taking failed the public use requirement because the extent of a redevelopment agency's "planning efforts" consisted of "finding a potential landowner for property that they did not own, and then designing a development plan around that new user." *Cottonwood* also made clear that "[c]ourts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely a pretext." *Id.* at 1229. As here, the government in *Cottonwood* offered up a pretextual reason to justify an ad hoc taking made outside the context of a comprehensive plan.[3]

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[3] Other federal courts of appeals have similarly emphasized the importance of a government acting in accordance with its comprehensive plan when other important constitutional rights are at stake. For example, in *Southside Fair Housing Comm.* v. *City of New York*, 928 F.2d 1336 (2d Cir. 1991), the Second Circuit upheld the City's sale of land to the Hasidic community against a First Amendment establishment of religion claim. It held that, under *Berman*, 348 U.S. at 34-35, when a city has in place a comprehensive "urban renewal plan" that is "'balanced'" and "'integrated,'" as did New York City, and acts pursuant to that plan, it may "make provision for sales of all sorts to private users" without running afoul of the Establishment Clause. 928 F.2d at 1347. The Seventh Circuit reached a similar conclusion in *Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 992 (7th Cir. 2006) (holding that, because the municipality acted pursuant to a comprehensive plan for land use, the challenged municipal land

Several state supreme courts have likewise rejected ad hoc and pretextual takings. In *Southwestern Ill. Dev. Auth.* v. *National City Envtl., L.L.C.*, 768 N.E.2d 1, 10 (Ill. 2002), for example, the Illinois Supreme Court, in striking down the use of eminent domain to supply parking to a racetrack, observed that the Development Authority "did not conduct or commission a thorough study of the parking situation" or "formulate any economic plan requiring additional parking at the racetrack." The taking was not "rooted * * * in the economic and planning process" and violated the public use requirements of the federal and state Takings Clauses, in part, for that reason. *Ibid.*

Similarly, in *Pheasant Ridge Assocs.* v. *Town of Burlington*, 506 N.E.2d 1152, 1156-1157 (Mass. 1987), the Supreme Judicial Court of Massachusetts disapproved a taking for a park and the construction of moderate income housing when the Town's real objective was to prevent construction of low income housing. Of particular relevance here, the court held that "[t]o have taken the site * * * to prevent the impact of the proposed development on the water, sewer, traffic, and other problems" would have been "an indirect and unfairly selective attack" on those problems and therefore improper. Among the factors that the court pointed to as undermining the validity of the taking—also relevant here—were that the site had not, before the planned development, "been considered for acquisition for park or recreational uses," that "[t]he matter of taking the subject site came forward only when the [developer's] proposal became known," and that the taking had not been subject to the usual planning and consultation process. *Id.* at 1157. The ruling in *Pheasant Ridge* cannot be reconciled with the ruling of the Supreme Court of New Jersey in this case.

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use regulations had a non-secular purpose and did not violate the Establishment Clause).

The Supreme Court of Georgia also would have decided this case differently. In *Earth Mgt., Inc.* v. *Heard County*, 283 S.E.2d 455, 459-461 (Ga. 1981), it held that "no law, statutory, constitutional or otherwise," permits a county to condemn property as "a public park for recreational purposes"—"even though the land may be put to this use after condemnation"—when "the real reason for its being taken was to thwart the application of another use" (a waste management facility in that case, single-family homes that would attract families with children in the present case). See also *Carroll County* v. *City of Bremen*, 347 S.E.2d 598, 599 (Ga. 1986) (invalidating the county's taking of land purportedly for use as a police training area where the "true reason for the condemnation was to prevent construction of a public sewage-treatment facility").

Supreme Courts in other states have reached the same result on similar analyses. In *City of Rapid City* v. *Finn*, 668 N.W.2d 324, 326-329 (S.D. 2003), the Supreme Court of South Dakota concluded that the City acted in bad faith and violated the public use requirement when it condemned plaintiffs' property for the asserted purpose of "facilitat[ing] public travel." The court deemed significant the fact that, prior to entering annexation negotiations with a third party who requested an access easement over the plaintiffs' property as a condition of annexation, "the City had demonstrated no interest in the property"; in fact, it previously had taken the position that the land was unsuitable for a roadway "because of [its] geographical nature." *Id.* at 327. In addition, in condemning the property, the City failed to act in conformity with its usual practice of conducting a "drainage study" and a "preliminary engineering evaluation to determine the feasibility" of the development. *Id.* at 328-329. The logical conclusion, according to the Supreme Court of South Dakota, was that the City acted unlawfully in condemning the property. *Id.* at 329.

The Supreme Court of Connecticut reached a similar conclusion in *AvalonBay Communities, Inc.* v. *Town of Orange*, 775 A.2d 284, 299-303 (Conn. 2001). AvalonBay contracted to purchase 9.6 acres of land to build a luxury apartment complex, within which some units would be set aside as affordable housing rentals. AvalonBay filed its site plan and applied for a special use permit with the Town Plan and Zoning Commission, which was denied. Thereafter, the Town Economic Development Commission began drafting plans for the development of an industrial park on the site and the Town voted to condemn the parcel. AvalonBay sued, alleging that the industrial park was a pretext to thwart the construction of affordable housing units. The state supreme court agreed. The Town's plans were not "developed and adopted in accordance with the relevant statutory provisions" and contained only the "'bare minimum amount of information and planning as to any future industrial park.'" *Id.* at 583. "[T]he haste and sparsity of the plan," the court concluded, demonstrated that the industrial park was adopted in "bad faith" and "as a pretext to thwart what would otherwise be a legitimate use of the property." *Id.* at 577, 583. See also *In re Hewlett Bay Park*, 265 N.Y.S.2d 1006, 1010 (Sup. Ct. 1966) ("The precipitate way in which the village moved to condemn this property, without any specific plan for its development, on the eve of the hearing of an application by the owner to use it for parking purposes" was "a perversion of the condemnation process"; finding the public use requirement violated when the village's real purpose was "not to use this property for something affirmative, so much as * * * to prevent its use for something else which the village authorities regard as undesirable"). In none of these courts would the condemnation of MiPro's property, undertaken without comprehensive planning and for pretextual reasons, have passed legal muster.

III. ANALYZED UNDER THE CORRECT STANDARDS, MOUNT LAUREL'S "PUBLIC USE" DETERMINATION VIOLATED THE TAKINGS CLAUSE.

Under the Takings Clause standards set forth in *Kelo*, *Berman*, and in state supreme court decisions like *Pheasant Ridge*, *Earth Management*, and *AvalonBay*, Mount Laurel's taking of MiPro's property violated the Fifth and Fourteenth Amendments. The Supreme Court of New Jersey erred in stripping all meaning from the public use limit on eminent domain by ignoring even the most basic procedural predicates for a valid condemnation decision.

The constitutional requirement that a municipality's public use determination be procedurally sound—that the taking result from planning rather than random, ad hoc decision-making and that the reasons given for the taking be the real ones, not a pretext for some other motive—were violated here. Justice Rivera-Soto's summary of facts "past dispute" (App., *infra*, 5a-6a) demonstrates why:

> MiPro's property was zoned for residential use, precisely the use MiPro intended, and, hence, no variances were required; the only governmental approval MiPro sought—and validly secured—was a subdivision approval to subdivide one large lot into smaller, residential lots that nonetheless each still conformed to the requirements of the Township's zoning ordinance; the Township failed to amend its zoning ordinance to list MiPro's property as other than for residential use in anything remotely close to a timely and fair manner; and, the Township's obvious purpose was not to increase open space for the use and enjoyment of its citizens, but plainly to forestall additional development and its concomitant additional demand on municipal facilities or services.

As the trial court elaborated, as a matter of "undisputed" fact Mount Laurel did not develop an "open space plan" that prioritized or ranked properties suitable for open space acquisition; its master plan did not "projec[t] 'need' for additional open space"; it performed no "study" and issued no "report" on the open space requirements of the Township; it allowed development of other residential properties to proceed, despite similarities in their size and nature to MiPro's project; the Township Manager did not consult the Planning Board in deciding to exercise eminent domain power; Mount Laurel was not concerned with the site's development when it was going to be used for an assisted living facility that would replace open space; and when it did belatedly amend its master plan to identify more potential open space it did so in a crude and over-inclusive manner. App., *infra*, 31a-35a, 43a-46a; see Andrew R. Davis, *Mt. Laurel's New Legacy? MiPro Could Widen the Gulf Between Homeowners and Renters*, 181 N.J.L.J. 1222 (Sept. 26, 2005) (Mount Laurel's "planning board amended the master plan after it granted final subdivision approval and during the pendency of the litigation. This amendment was rather crude in that it simply targeted all remaining undeveloped land in Mt. Laurel as open space" and was "so overbroad that it could not possibly qualify as a 'plan' under the most liberal interpretation of the word").

At a minimum, comprehensive planning for open space would have required Mount Laurel to conduct a study to determine the community's open space needs, then determine if open space was needed in the vicinity of MiPro's land, and then determine if MiPro's land, specifically, was suitable for open space uses. Mount Laurel conducted the necessary inquiry at not one of those planning stages. Instead its actions, in the words of one commentator, rested on "an oxymoronic land-use concept: 'spot planning,'" and "[j]ust about all of [them] appear to reflect intentions that are less than pure." Davis, *supra*, 181 N.J.L.J. at 1222.

In these circumstances, Mount Laurel's "[a]mbush acquisition" of MiPro's land "is the antithesis of planning—a detailed plan and methods for land use and development." Gary S. Forshner & Vincent J. Mangini, *Court Greenlights Ambush Acquisitions: Recent Eminent Domain Decision Endorses Assault on Housing*, 181 N.J.L.J. 1219 (Sept. 26, 2005). As Justice Rivera-Soto explained, "the Township's transparent after-the-fact explanations of its public policy basis for the condemnation of MiPro's property simply do not withstand serious scrutiny" under the Constitution. App., *infra*, 4a. To the contrary, Mount Laurel's ad hoc and pretextual decision to condemn demonstrates that it "acted unreasonably, in bad faith, or in circumstances revealing arbitrary or capricious actions." *Id.* at 5a; see also Kanner, *supra*, JUST COMPENSATION, Dec. 2006, at 12 ("bad faith * * * surely includes cases where the city says one thing about the public purpose while taking the subject property for another one").

If the public use requirement of the Takings Clause is to retain any meaning after *Kelo*, "towns should [not] be able to ignore their own land use plans and ordinances in order to discriminate against families with children." Editorial, *Ambush Acquisition*, 181 N.J.L.J. 490 (Aug. 8, 2005). Mount Laurel has run afoul of that restriction before, having been found in *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 336 A.2d 713, 729 (N.J. 1975), to have systematically used its zoning "to restrict the number of families in the municipality having school age children and thereby keep down local education costs." Striking down that zoning, the Supreme Court of New Jersey observed that "[s]uch restrictions are so clearly contrary to the general welfare as not to require further discussion." *Ibid.*; see also App., *infra*, 8a-9a; *Southern Burlington County NAACP* v. *Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

"Municipal planning, done properly and comprehensively, is the appropriate vehicle to address traffic, congestion and crowded schools." Editorial, *Ambush Acquisition*,

supra, 181 N.J.L.J. at 490. "Once a municipality completes its land-use planning," including "open space planning," "it should be bound by the regulations resulting from that process, just as landowners are," without "popular sentiment and political reaction" being "allowed to trump the deliberative planning process." *Ibid.* These admonitions reflect this Court's precedents, including *Kelo*, which in turn rest on a fundamental respect for property rights inscribed in the Constitution and given effect by procedural protections disregarded by the court below.

* * * * *

In sum, *Kelo* and its predecessors clearly show that defects of precisely the sort present here—an ad hoc open space determination that was not subject to comprehensive planning and that served to camouflage an animus against residential development—are fatal to a municipality's public use decision. Other federal and state courts agree that the Takings Clause requires that a municipality's public use decisions satisfy basic standards of procedural fairness. The Supreme Court of New Jersey's radical departure from these principles requires this Court's intervention. It supplies an ideal opportunity for the Court to elaborate the standards outlined in *Kelo* and to dispel the widespread uncertainty in the lower courts over the constitutional limits on taking property for "public use."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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